PUBLIC PROSECUTOR

v.

JAWAN AK EMPALING & ANOR.

HIGH COURT SABAH & SARAWAK, SIBU
TUAN MUHAMMAD KAMIL BIN AWANG J
[CRIMINAL APPEAL NO. 1 OF 1995]
29 JUNE 1995

CRIMINAL PROCEDURE: *Appeal - Appeal to High Court - Petition of appeal - Time for filing - Section 307(4) CPC - Whether time runs from the date the grounds of judgment was posted - Whether to start from the date the judgment was received by appellant - Petition of appeal filed 13 days after judgment was posted but 5 days after receipt thereof - Whether out of time - Criminal Procedure Code s. 307(4).*

CRIMINAL PROCEDURE: *Appeal - Petition of appeal - Mode of filing - Filing by way of fax transmission - Whether permissible - Decision by Registrar to accept appeal - Whether a proper exercise of discretion - Section 307 Criminal Procedure Code - Construction - Whether to be liberally interpreted.*

EVIDENCE: *Documents - Fax copy - Whether a document in law - Whether a primary document - Whether unlawful document - Evidence Act 1950 ss. 3, 63.*

WORDS & PHRASES: *"Has been served" - Section 307(4) Criminal Procedure Code.*

The respondents, the Chairman and Councillor respectively of the Sibu Rural District Council (the Council), were charged with corrupt practice under s. 2(1) Emergency (Essential Powers) Ordinance 1970. They were alleged to have deliberated in a meeting of the Council whereby a contract was awarded to a company in which both of them had vested interest. The learned Sessions Judge, having called both respondents to their respective defence, acquitted and discharged the 1st respondent, but found the 2nd respondent guilty and in consequence convicted and sentenced him to one day imprisonment and a fine of RM4,000 in default 12 months imprisonment. The Public Prosecutor, dissatisfied, appealed against the whole of the decision. At the outset of the appeal, the respondents challenged the competency of the appeal, raising in effect two preliminary objections, namely, that the appeal, having been filed more than 10 days after the posting of the grounds of judgment, was filed out of time and in contravention of s. 307(4) Criminal Procedure Code, and secondly, that the petition of appeal, being a fax copy, was not an original or primary document within the meaning of s. 63 Evidence Act 1950, and so, could not properly be filed in Court under the said s. 307.

The facts showed that on 2 December 1994, following the lodgement of the notice of appeal, the Registrar at Sibu posted the relevant notes of proceedings to the appellant in Kuala Lumpur. The documents reached the appellant on 10 December 1994, i.e some 8 days later, and five days after that, on 15 December 1994, the appellant filed the petition of appeal. As it was the filing was effected by way of fax transmission, apparently to beat the time limit set for filing the petition. The appeal, nonetheless, was duly registered by the Court.

Before the appeal Judge, the primary issues that arose were:

1. Whether the time for filing a petition of appeal under s. 307(4) of the Code starts to run from the date of posting of the documents mentioned therein, or the receipt thereof by the appellant.

2. Whether a fax copy of the petition of appeal is an unlawful document in law, and so, cannot be used for purposes of filing an appeal in the High Court.

Held:

[1] Sub-section 4 of s. 307 of the Code prescribes the time of 10 days within which an appeal may be lodged but it does not provide when the time begins. Nor does it provide the mode of service of the grounds of decision on the appellant. However, the intention of the legislature is clear. The words "has been served" in the sub-section can only mean that, so far as it is within the power of the sender, the said documents or notice should come into the hands of the addressee.

[2] It is a fallacy to think that s. 307(4) of the CPC envisages that time must start to run from the date of posting. Such a construction is clearly unrealistic and impracticable. Upon the proper reading of s. 307(4), time must run from the actual date the relevant documents were received by the appellant. In this case, therefore, time started to run from 10 December 1994, which means that the appeal was filed well within the prescribed time limit.

[3] Section 307 CPC does not provide specifically that only the original copy of the petition of appeal ought to be lodged. The section, being a procedural law, is open to a liberal construction and so, it may extend to include a copy other than the original copy.

[4] A copy of a document in whatever form in most cases has been accepted and widely used as documentary evidence in Court in cases where the original is not readily available. An illustration to s. 3 Evidence Act 1950, in addition, states that a photographic or other visual recording including a recording of a photographic or other visual transmission over a distance, is a document. In the light of these, a fax copy of the petition of appeal

here cannot be said to be an unlawful document. Clearly, such a document is a document within the meaning of s. 3 of the Evidence Act.

[5] It is untenable to contend that a fax copy is not an original or primary document within the meaning of s. 63 of the Evidence Act 1950. Section 63 of the Act mainly concerns with evidence, the proof of a fact by means of a documentary evidence, either primary or secondary. In the instant case, there was no dispute as to the content of the said documents. In any case, the appeal here, having been accepted by the Registrar, must be deemed to have been properly filed. On the facts, there is no reason for the Court to intervene in the Registrar's exercise of his discretion in accepting the appeal in the form it was presented to the Court.

[6] Bearing in mind the evidence, in particular the proof that the two brothers of the first respondent had ceased to be the shareholders of the company at the material time, the learned Sessions Judge had rightly acquitted and discharged the 1st respondent. This apart, in sentencing the second respondent, the Sessions Judge had clearly taken into consideration all the extenuating circumstances including his long service with the Council and his clean record. In the event this Court also has no reason to interfere with the sentence imposed.

[Preliminary objections overruled. Appeal dismissed]

Cases referred to:
Fawcett v. Graham [1973] 1 NZLR 495 ***(foll)***
West v. Francis [1822] 5B & ALD. 738 ***(foll)***
Public Prosecutor v. Lee Ee Teong [1953] 19 MLJ 244 ***(refd)***
Public Prosecutor v. Saimin & Ors. [1971] 2 MLJ 16 ***(refd)***
Mah Kok Cheong v. R. [1953] 19 MLJ 46 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 307,(4)
Evidence Act 1950, ss. 3, 63

For the appellant - Ahmad Rosli bin Mohd. Sham; DPP
For the respondents - Awang Bemee Hj. Awang Ali Basah; M/s. Awang, Lai & Co.

JUDGMENT

Muhammad Kamil Awang J:

At the outset of the hearing of the appeal, the learned Counsel for the respondents/accuseds raised two preliminary objections: first, the appeal was filed out of time in contravention of s. 307(4) of the Criminal Procedure Code (Cap. 6 F.M.S.) (hereinafter called "the Code") and no application for an extension of time had been made. According to a letter dated 19 January 1995, the Registrar of the Subordinate Courts at Sibu stated that the notes of

proceedings and judgment (hereinafter called "the said documents") were sent by registered mail to the appellant on 2 December 1994 and the appellant filed a petition of appeal on 15 December 1994 which was outside the prescribed time under s. 307(4) of the Code. Secondly, the petition of appeal was not the original copy but the petition was faxed to the Court on 15 December 1994. He argued that as a fax copy was not an original or primary document within the meaning of s. 63 of the Evidence Act 1950, therefore, it was not a document in law, and as an unlawful document, it could not be filed in Court under s. 307 of the Code.

In reply the learned Deputy Public Prosecutor maintained that the said documents were received by the Deputy Public Prosecutor's office on 10 December 1994 and the petition of appeal was filed on 15 December, 1994 which was well within the prescribed time. He contended that the date on which the said documents were received was in fact the date on which the said documents were served on the appellant, and time started to run from the date of service, and not the date of posting of the said documents.

Secondly, it had been shown that the said documents sent by the Sibu Court by registered mail took 8 days to reach the Deputy Public Prosecutor's office in Kuala Lumpur. Here time was of the essence and to beat the time limit within which the appellant had to file the appeal, the appellant was left with no choice save to despatch it by the quickest means possible; and the petition of appeal was faxed to the Sibu Court, where it was filed on the same day i.e. 15 December 1994. The original petition of appeal would be produced later.

Having heard the submissions by the parties, the Court overruled both objections.

The first point of objection raised is whether the time for filing a petition of appeal under s. 307(4) of the Code starts to run from the date of the posting or the receipt of the said documents by the appellant.

Section 307(4) of the Code states:

> Within ten days after the copy of the grounds of decision has been served as in the last preceding subsection provided, the appellant shall lodge with the clerk of the Magistrate's Court at which the trial was held a petition of appeal in triplicate addressed to the High Court.

Subsection (4) of s. 307 of the Code prescribes the time of ten days within which an appeal may be lodged but it does not provide when the time begins. Nor does it provide the mode of service of the grounds of decision on the appellant. However, the intention of the legislature is clear, as the words "has been served" in subsection 4, mean so far as it is within the power of the sender, the said documents or notice should come into the hands of the addressee. In the sense that the provision of s. 307(4) is permissive only and equate other mode of service with personal service where the facts are proved

are such that the proper inference is the addressee actually received the notice. "The mere proof that the notice was sent 'by post in a registered letter addressed to him' there is no proof of service of the notice unless it is also proved that the registered letter was actually delivered at the address. As a registered letter must be signed for (though not necessarily by the addressee), delivery should not be difficult to prove, but it is not necessary to go to that length. So long as it is proved that the registered letter has not been returned undelivered the reasonable inference in most cases will be that delivery was duly made"- per Wilson J. in *Fawcett v. Graham* [1973] 1 NZLR 495. Implicitly, when the delivery of the notice is proved, then the notice is deemed to have been received. Notice received is notice served.

The rationale is simply this. In our country, the speed at which a registered mail takes to travel varies from state to state, and if, for example, a letter is posted from a state in East Malaysia, it takes a longer time to reach a destination in a state in West Malaysia. It is a fallacy to think that s. 307(4) of the Code envisages that the time starts to run from the date of posting of the notice which has been proved to be not realistic and practicable as is well illustrated by this case.

In the instant case, the date on which the said documents were served on the appellant was 10 December 1994, i.e. the actual date on which the said documents were delivered or received by the appellant. Time started to run from 10 December 1994 which means that the appeal which was filed on 15 December 1994 was well within the time limit as prescribed under s. 307(4) of the Code.

The second point raised is whether a fax copy of the petition of appeal is an unlawful document, and it cannot be used for purposes of filing an appeal in the High Court.

Section 307 of the Code does not provide specificially that only the original copy of the petition of appeal ought to be lodged. Being a procedural law, it is permissible to give it a liberal construction that it may extend to include a copy other than the original copy. A copy is that which comes so near to the original as to give every person seeing it the idea created by the original" - per Bayley J. in *West v. Francis* [1822] 5B. & ALD 738. Today, the tremendous technological advance has revolutionised the means of communication that we have come to accept technological innovations in numerous fields, and that a copy of a document in whatever form in most cases has been accepted and widely used as documentary evidence in Court in cases where the original is not readily available. As such the definition, of a document has been enlarged extensively as contained in s. 3 of the Evidence Act 1950, which provides that:

'document' means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of:

(a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;

(b) any visual recording (whether of still or moving images);

(c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;

(d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraphs (a), (b) or (c),

or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter.

In the illustrations thereto, the following illustration is relevant.

A photographic or other visual recording, including a recording of a photographic or other visual transmission over a distance, is a document.

The learned Counsel's contention that a fax copy was not an original or primary document within the meaning of s. 63 of the Evidence Act 1950 and was therefore not a lawful document in law, does not hold water. It appears to be a theoretical point used as a rhetorical device. Section 63 of the Act mainly concerns with evidence, the proof of a fact by means of a documentary evidence, either primary or secondary. In the instant case, there was no dispute as to the content of the said documents, and we are concerned with a fax copy of the documents which may be used in filing an appeal. In the light of the reasons as expounded above, I do not think a fax copy of the petition of appeal is an unlawful document. In my view, a fax copy of a document is a document within the meaning of s. 3 of the Evidence Act 1950. In the circumstances, and as the appeal had been accepted by the Registrar it was deemed to have been properly filed and I see no reason to intervene in the Registrar's exercise of his discretion in accepting the appeal in the form it was presented to the Court. It is not unlawful. I would rule that the appeal as in this case has been properly filed and within the time limit under s. 307(4) of the Code.

In the case, the accuseds were respectively charged as follows:

lst accused:

That you on 13.4.1988 at the Sibu Rural District Council at Jalan Bujang Suntong, in the District of Sibu, in the State of Sarawak, being a public officer, to wit, Chairman of the Sibu Rural District Council, committed corrupt practice for your advantage, in that while you being such officer did take part in the decision of

the Finance and Establishment Standing Committee of the Sibu Rural District Council to wit, to recommend the application of a contract for the annual supply of plants, equipments, transportation, on "as and when required basis" to Sibu Rural District Council, by Syarikat Berjaya Bersatu, in which your brothers namely KUSAU AK. EMPALING and TIRA AK. EMPALING were shareholders thereof at the material time, and that you have thereby committed an offence punishable under s. 2(l) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

2nd accused:

That you on 13.4.1988 at the Sibu Rural District Council, at Jalan Bujang Suntong, in the District of Sibu, in the State of Sarawak, being a public officer namely a Councillor of Sibu Rural District Council, committed corrupt practice for your advantage in that while you being such officer did take part in a decision of the Finance and Establishment Standing Committee of the Sibu Rural District Council in which you were interested, to wit, to recommend the application of a contract for the annual supply of plants, equipments, transportation, on "as and when required basis" to Sibu Rural District Council, by Syarikat Berjaya Bersatu in which you were a shareholder thereof at the material time, and that you have thereby committed an offence punishable under s. 2(l) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

At the end of the trial, the 1st accused was acquitted and discharged whilst the 2nd accused was convicted and sentenced to 1 day imprisonment and a fine of RM4,000 or in default 12 months imprisonment. Now the learned Deputy Public Prosecutor appealed against the order of acquittal and discharge of the lst accused, and against the sentence of the 2nd accused as manifestly inadequate.

Brief facts of the case are these: The 1st accused was the Chairman and the 2nd accused was a Councillor of the Sibu Rural District Council. At a meeting of the Council on 13 April 1988 the accuseds were present and participated in the deliberation of the Council, whereby the Council awarded a contract of supplies to Syarikat Berjaya Bersatu. Unbeknown to the Council, the 2nd accused and the 1st accused's two brothers were shareholders of the Syarikat Berjaya Bersatu. Neither of the accuseds had disclosed their interests in the Syarikat Berjaya Bersatu nor did they leave the meeting. They sat throughout the meeting.

In a criminal trial, the general burden of proof beyond reasonable doubt on the guilt of the accused is always on the prosecution and it never shifts. If the prosecution fails to produce evidence which is believed and which, if unrebutted, would make out every such ingredient then the case must be dismissed without the accused person being called upon to make his defence. If he is called upon to make his defence then the Court must consider the evidence as a whole and, if satisfied that every ingredient of the offence had been proved then convict, - per Thomson J in *Public Prosecutor v. Lee Ee Teong* [1953] 19 MLJ 244. In *Public Prosecutor v. Saimin & Ors*. [1971] 2 MLJ 16, Sharma J said (at p. 17):

> ... The burden of proof remains on the prosecution throughout the trial. If the learned Magistrate was not satisfied with the case for the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases with which we are not concerned here.
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> As the learned Magistrate seems to have ignored the very basic principle of criminal law, it may perhaps serve a useful purpose to remind those administering justice in the lower Courts that evidence discloses a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused.

Bearing in mind that at the close of the case for the prosecution, and if a case has been established, the defence may rebut the prosecution case by raising a reasonable doubt as to the truth of the prosecution evidence. It is immaterial whether the defence is true or not. All it needs is for the defence to cast a doubt on the prosecution case. The doubt must be a reasonable doubt and not one based on suspicion or conjecture.

Spenser Wilkinson J had this to say in *Mah Kok Cheong v. R.* [1953] 19 MLJ 46 at p. 47:

> ... But whatever may be the defence to a criminal charge the sole question which a Subordinate Court has to ask itself at the conclusion of the trial is - Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt? I say "the sole question" advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first proved a case. In this respect our criminal procedure differs from that in England and this difference makes it necessary to apply with caution the English decisions which almost all deal with trials by jury.

In *R v. Saiman (supra)* Sharma J explained the meaning of a 'reasonable doubt' at p. 17:

> The following definition of 'reasonable doubt' is often quoted:
>
> > It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.
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> It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there.

In the instant case, on the evidence adduced by the prosecution, the Court found that a *prima facie* case had been made out against both accuseds. They were called to enter the defence. The 1st accused in his defence admitted that Tira ak. Empaling and Kusau ak. Empaling were his brothers and who were, at one time, the shareholders of Syarikat Berjaya Bersatu. But at the material time the two brothers had ceased to be shareholders as they had disposed of all their shares in Syarikat Berjaya Bersatu and transferred them to the buyer, the 2nd accused in 1987, vide the memorandum of transfer (Exh. D2). Further, this was corroborated by the 2nd accused's declaration (Exh. D1). This was not disputed. This piece of evidence had created a reasonable doubt in the mind of the learned Sessions Court Judge, who had resolved it on the balance of probabilities in favour of the lst accused, and, therefore, she had rightly acquitted and discharged the lst accused. I would affirm the order.

The 2nd accused's defence had failed to cast a reasonable doubt on the prosecution case, and the Court found him guilty as charged, and convicted him.

As to the inadequacy of the sentence against the 2nd accused, the learned Sessions Court Judge had taken into consideration all the extenuating circumstances, public interest, the long service that he had served in the Sibu Rural District Council and had a clean record and in exercising her discretion, sentenced him to 1 day imprisonment and a fine of RM4,000 or in default 12 months imprisonment. I have no reason to interfere with the sentence imposed by the Court below as it was not manifestly inadequate and the trial Judge had committed no error and had acted in accordance with the law. I would affirm the sentence.

Reported by W.A. Sharif